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In the Supreme Court of the United States

OCTOBER TERM: 1983

G. HAROLD KING, JR.,

Petitioner

versus

FIDELITY NATIONAL BANK OF BATON ROUGE,

Respondent

OPPOSITION OF FIDELITY NATIONAL BANK OF BATON ROUGE TO APPLICATION OF G. HAROLD KING, JR. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

RESPONDENT'S REPLY TO PETITIONER'S STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 1

A CONCISE STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

CONCLUSION 9

TABLE OF AUTHORITIES

(In order of Appearance)

Page

Garrigan v. Giese, 420 F.Supp. 68 (E. D. MO. 1976) 6

Becker v. Safelite Glass Corp., 244 F.Supp. 625 (D. Kan. 1965) 6

Sopp. v. Gehrlein, 236 F.Supp. 823 (W.D. Pa. 1964) 6

Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959) 6

11 U.S.C. 303 6

28 U.S.C. 1480(h) 7

1 *Collier on Bankruptcy* (15th Ed.) ¶3.01[4][c][iii] 7

Northern Pipeline Construction Company v. Marathon Pipeline Company, ____ U.S. ____, 102 S. Ct. 2858 (1982) 7

In Re O.P.M. Leasing Services, Inc., 9 B.C.D. 335 (S.D. N.Y. 1982) 7

Federal Rules of Civil Procedure Rule 4 8

Federal Rules of Civil Procedure Rule 45 8

Federal Rules of Appellate Procedure 45 8

28 U.S.C. 956 8

Page

United States v. Portland Cement Company, 338 F.2d 798 (10th Cir. 1974) 9

Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), cert. denied, 380 U.S. 956, 85 S.Ct. 1082 (13 L.Ed. 2d 972, 1965) 9

RESPONDENT'S REPLY TO PETITIONER'S STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

I.

There were two principal appeals pending in this matter before the United States Court of Appeals for the Fifth Circuit. Each appeal had a separate docket number: Case Number 82-3379 and Case Number 82-3754. On motion of Petitioner, the two cases were consolidated for purposes of oral argument. However, separate opinions were entered in both cases. The opinion in Case Number 82-3379 is reproduced at Page 19 of Petitioner's Appendix (hereafter "P.A."). The opinion in Case Number 82-3754 has not been reproduced in either Petitioner's or Respondent's Appendix (hereafter "R.A.). Both Petitioner and Respondent filed petitions for rehearing in Case Number 82-3379, both of which were denied on October 11, 1983. (R.A. p. 1a.) Only Petitioner filed a petition for rehearing in Case Number 82-3754, which was denied on September 30, 1983 (R.A. p. 2a.) Subsequently a judgment was issued by the District Court (R.A. p. 3a) and by the Bankruptcy Court (R.A. p. 5a) as to the Case Number 82-3379.

Respondent urges that the petition was filed beyond the sixty day period of Rule 20 of the Supreme Court, having been filed more than sixty days following the denial of the rehearing.

II.

The petition on its face is only the petition of G. Harold King, Jr. Therefore, this Court has no jurisdiction over the second "question presented for review" by the Petitioner, inasmuch as such "question" only relates to Shirley G. King. Shirley G. King not being a petitioner herein, this Court has no jurisdiction over the second question presented in the petition.

A CONCISE STATEMENT OF THE CASE

On July 24, 1981, Fidelity National Bank of Baton Rouge ("Respondent") filed an involuntary petition under the Bankruptcy Code against G. Harold King, Jr. and Shirley G. King. (Throughout this Brief, the term "Debtors" shall refer to both G. Harold King, Jr. and Shirley G. King. The term "Petitioner" shall refer only to G. Harold King, Jr.) The claims of the Respondent against the Debtors arise out of the various transactions described in Respondent's Motion for Summary Judgment[1] and reference is made thereto for a complete description of the transactions. At all times pertinent, each claim was fixed, liquidated, and non-contingent. As of July 24, 1981, and at all times pertinent, the Debtors were not generally paying their debts as they became due.

In response to the petition, the Debtors filed various motions. In response to the motions of the Debtors and in order to obtain more information concerning the allegations raised therein, the Respondent requested the Bankruptcy Court to

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[1] Respondent's Motion for Summary Judgment has not been printed in Respondent's Appendix. However, a copy has been lodged with the Clerk of this Court for filing in the record.

issue a subpoena directing the Debtors to appear for a Rule 205 Examination. Despite being properly served with the subpoena, the Debtors failed to appear for the examination as ordered on advice of counsel, and did not notify Respondent of their intention not to appear until after the time scheduled for the examination. Thus, the Respondent filed a Motion for Sanctions. The Bankruptcy Court granted the Motion, assessing the Debtors' counsel with the reasonable expenses into appear for the examination without substantial justificacurred by the Respondent due to the refusal of the Debtors tion.

Following the filing of Respondent's Motion for Summary Judgment, Capital Investments, Inc. and Louisiana Equity Capital Corporation filed appropriate motions and were granted leave to intervene as petitioning creditors in this case.

On September 11, 1981, the Debtors filed an Answer and Demand for Jury Trial (P.A. p. 15). Subsequently, while Respondent's Motion for Summary Judgment was still pending, both Petitioner and Shirley G. King filed separate cross Motions for Summary Judgment. The Debtors also filed a Motion in the United States District Court for a Partial Stay "to prevent the Bankruptcy Court from hearing and disposing of a Motion for Summary Judgment filed by the Fidelity National Bank of Baton Rouge." The stay was denied by the District Court.

On November 10, 1981, the Court denied the Debtor's Motion to dismiss the petition for failure to state a claim and for lack of jurisdiction, denied the Motion of the Debtors to dismiss the interventions of Louisiana Equity Capital Cor-

poration and Capital Investments, Inc., denied the Motion of the Debtors to strike the claim of Respondent, and considered the merits of the cross Motions of the Debtors and the Respondent for Summary Judgment. The Court granted Summary Judgment in favor of Respondent. (R.A. p. 6a.)

Following the entry of judgment, the Debtors were ordered to file schedules and statements of affairs. On November 19, 1981, they applied to the District Court for an "emergency temporary stay pending appeal" of the Debtors' appeal of the various orders previously entered by the Bankruptcy Court. The request for an emergency temporary stay was denied by the District Court. Following the denial, the Debtors filed a request in the United States Court of Appeals for the Fifth Circuit for an extraordinary writ to be directed to the District Court and the Bankruptcy Court. (The request for an extraordinary writ was given Docket Number 81-3726 in the Fifth Circuit.) On December 21, 1981, the Fifth Circuit "ordered that the petition for extraordinary writ under 28 U.S.C. 1651 and Rule 21 FRAP is denied."

The Debtors appealed to the District Court, which entered an opinion affirming all decisions of the Bankruptcy Court.[2] The Debtors then appealed to the Fifth Circuit, which affirmed the judgment of the District Court except in regards to Shirley G. King (P. A. p. 19).

SUMMARY OF ARGUMENT

Petitioner has presented two questions for review. Nei-

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[2] The District Court's opinion was extensive. The Petitioner did not include the District Court opinion in his Appendix, as is required by Rule 21.1(k) (ii). Respondent, however, has lodged a copy of the opinion with the Clerk of this Court for filing in the record.

ther are sufficiently important to warrant this Court's attention. The first question presented for review concerns the alleged denial by the courts below of Petitioner's alleged right to a jury trial. Petitioner, however, was not entitled to a jury trial due to the discretion granted to the Bankruptcy Court, and moreover due to the fact that the Petitioner waived his right to a jury trial by filing a Motion for Summary Judgment and by his failure to properly request a jury trial.

The second question presented for review concerns whether it was correct for the Bankruptcy Court to issue a subpoena for an examination of Mrs. King pursuant to Rule 205 of the Rules of Bankruptcy Procedure. Petitioner alleges that the subpoena issued to Mrs. King was improper because of the following reasons: (1) No "order of court" was obtained for the subpoena; and (2) the Fifth Circuit subsequently dismissed the involuntary proceeding against Mrs. King. As to the first matter, the distinction that the Petitioner attempts to make between a subpoena issued by a federal court clerk under seal of the court and a formal "order of court" is ill-founded and incorrect. As to the second matter, obviously Mrs. King was a party to this proceeding until the Fifth Circuit ruled on September 30, 1983. The issuance of the subpoena in 1981 at a time when Mrs. King was a party was clearly appropriate under the circumstances. Finally, the Petitioner in this case is G. Harold King, Jr., not Shirley G. King. Therefore, this Court has no jurisdiction over the second question presented for review, inasmuch as Petitioner G. Harold King, Jr. has no justiciable interest therein.

On both these issues, there is great unanimity of opinion and an unbroken line of authority. The courts below merely

followed long-held doctrines that have successfully stood the test of time.

ARGUMENT

Petitioner alleges that he was denied his right to a trial by jury. However, the Petitioner filed his own Motion for Summary Judgment in response to Respondent's Motion for Summary Judgment. Summary judgment is in effect trial on the merits. *Garrigan v. Giese*; *Becker v. Safelite Glass Corp.*; *Sopp v. Gehrlein*. Respondent's Motion for Summary Judgment was amply supported by the pleadings and affidavits filed in the record, as found by the District Court and the Fifth Circuit. The Petitioner did not see fit or was unable to contest the factual allegations of the affidavits filed in the record. The Bankruptcy Court was faced with opposing motions for summary judgment — it ruled based on the evidence before it. The citations in Petitioner's brief to cases such as *Cameron v. Vancouver Plywood Corp.* are inapposite, because having filed his own motion, Petitioner subjected himself to having the doubts as to the existence of a genuine issue of material fact resolved against him as mover as well as to a trial without a jury. As both courts below found, the so-called "issues of fact" raised by Petitioner were not issues that were capable of consideration by the Bankruptcy Court in determining the propriety of the entry of an order for relief under 11 U.S.C. 303.

Even assuming, arguendo, that Petitioner was nevertheless entitled to a jury trial despite waiver thereof by filing his own Motion for Summary Judgment, the Petitioner additionally waived his right for a jury trial by not making a proper and timely jury demand. As pointed out in the District

Court opinion on page 6, ". . . the request [for a jury trial] was not properly made, since the debtors requested a jury trial in the **district court** before the district judge, but the request was directed to the bankruptcy judge, who has no authority over the district court. Any right which the [Debtors] might have had, if any, was therefore waived by not making a proper and timely jury demand."

Moreover, the right to a trial by jury, at least as of September 24, 1981, the date of the denial by the Bankruptcy Court of Petitioner's Request for Jury Trial, was discretionary with the Bankruptcy Court. 28 U.S.C. 1480(b); 1 *Collier on Bankruptcy* (15th Ed.) ¶3.01[4][c][iii].

Petitioner relies to a great extent on *Northern Pipeline Construction Company v. Marathon Pipeline Company* for the proposition that 28 U.S.C. 1480 is unconstitutional. However, the sole holding of *Marathon* is that "the broad grant of jurisdiction to the Bankruptcy Court contained in Section 241(a) [of the Bankruptcy Code, 28 U.S.C. 1471 et. seq.] is unconstitutional." 102 S.Ct. at 2880. Moreover, this Court stayed the effect of *Marathon* until October 4, 1982. The denial of Petitioner's request for a jury trial was made on September 24, 1981, and the Motion for Summary Judgment in favor of Respondent was granted on November 11, 1981. *Marathon* applies prospectively only, and thus has no effect on the disposition by the Bankruptcy Court in 1981. See *In Re O. P. M. Leasing Services, Inc.*

Petitioner's "second question presented for review" concerns various allegations regarding Rule 205 of the Rules of Bankruptcy Procedure, but **only** insofar as Mrs. King. Mrs. King has not applied for a writ of certiorari and is therefore

not a petitioner herein. The Petitioner herein, Mr. King, has no justiciable interest in the matters relating to the examination of Mrs. King. Should Mrs. King have desired to raise such issues, she should have properly filed a petition in this Court within the applicable time provided by law.

Despite Respondent's contention that Petitioner has no justiciable interest in regards to matters affecting Mrs. King, Respondent nevertheless will address the issue raised by Petitioner in regard to Rule 205. Petitioner attempts to differentiate between an "order of court" and a subpoena issued by the clerk of a federal court under seal of the court, but cites no ground or authority for such a distinction. Such a distinction is ill-founded and incorrect. It is well-settled and no citation of authority need be given that the clerk of a federal court may properly issue orders under the seal of the court where provided by law. (See e.g., FRCP 4, 45; FRAP 45; 28 U.S.C. 956. In fact, FRCP 45(a) provides that "every subpoena shall be issued by the **Clerk** under the seal of the court . . ." [Emphasis added.]) As stated by the Fifth Circuit in its opinion below,

> "The Kings' defense against the sanctions is based in part on the theory that a subpoena is not a court order. [Footnote: They do not actually argue that a subpoena is not a court order for purposes of Rule 37, but rather that it is not a court order for purposes of Bankruptcy Rule 205(a) . . . the argument is equally specious in both contexts]. Not surprisingly, they cite no authority for this novel proposition. [Footnote omitted] Even if a subpoena were not a court order (which is not the case), the sanction here would still have been available under Rule 37(d)."

The District Court opinion (page 3) similarly found no dis-

tinction beween an order of the court and a subpoena issued by the clerk of court under seal of the court.

Petitioner also objects to the $250.00 fine levied against his attorney for directing his clients not to appear at the examination. It must be noted that Petitioner's counsel was an appellant in the Fifth Circuit (R.A. p. 4a), inasmuch as the fine was levied against the attorney personally. Petitioner's counsel has not applied to this Court for relief from the fine. Petitioner has no right to appeal the fine that was levied against his counsel where his counsel appeared as an appellant in the courts below. Even if Petitioner has the right to raise this issue, as pointed out by the Fifth Circuit, the argument of Petitioner is flawed. Petitioner's attempt to distinguish the cases of *United States v. Portland Cement Company* and *Pioche Mines Consolidated, Inc. v. Dolman* is without merit. The fact that these cases dealt with a deposition as opposed to a Rule 205 examination is a distinction without a difference. Those cases clearly held that a motion to quash must be not only made but granted before the scheduled examination in order to excuse compliance. See also Footnote 8 to the opinion of the Fifth Circuit.

CONCLUSION

The issues raised by Petitioner have been adjudicated by three separate courts in a total of in excess of fifteen separate appeals. Pretermitting the right of Petitioner to raise the "second question presented for review," the questions presented to this Court do not meet the standards of Rule 17 of the Rules of the Supreme Court as to the considerations governing review on certiorari. The results in this case were not unfair to

Petitioner. Finally, for reasons fully addressed by the courts below, Petitioner's legal arguments are flawed and groundless.

For the reasons stated, this Court should deny the petition for Writ of Certiorari.

By Attorneys,

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/s/ David S. Rubin

CERTIFICATE OF SERVICE

I certify under Rule 28.5 of the Rules of the Supreme Court that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Opposition and Appendix to Mr. Franz Joseph Baddock, P. O. Box 3573, Baton Rouge, LA 70821. I have further forwarded one (1) copy of the foregoing Opposition and Appendix to Mr. Frederick R. Tully, P. O. Box 2471, Baton Rouge, LA 70821; Mr. Charles N. Malone, P. O. Box 3233, Baton Rouge, LA 70821; and Mr. Michael T. Perry, 5420 Corporate Boulevard, Suite 302, Baton Rouge, LA 70808.

Baton Rouge, Louisiana, this _____ day of January, 1984.

/s/ David S. Rubin